

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN A. GERTSCH,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-00554-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 14 and 15). Plaintiff is represented by Maureen J. Rosette. Defendant is represented by Leisa A. Wolf. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner's decision will be disturbed "only if it is not supported
8 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
10 relevant evidence that "a reasonable mind might accept as adequate to support a
11 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to "more than a mere scintilla[,] but less than a
13 preponderance." *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record "is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ's findings if they are supported by inferences reasonably drawn from the
20 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on March 26, 2008. Tr. 148-54. These
10 applications were denied initially and upon reconsideration, and a hearing was
11 requested. Tr. 84-88, 90-92, 105-08. A hearing was held before an Administrative
12 Law Judge on April 1, 2010. Tr. 39-79. The ALJ rendered a decision denying
13 Plaintiff benefits on June 25, 2010. Tr. 24-33.

14 The ALJ found that Plaintiff met the insured status requirements of Title II
15 of the Social Security Act through September 30, 2010. Tr. 26. At step one, the
16 ALJ found that Plaintiff had not engaged in substantial gainful activity since May
17 15, 2007, the alleged onset date. Tr. 26. At step two, the ALJ found that Plaintiff
18 had severe impairments consisting of epilepsy, migraine headaches, and status post
19 surgical repair of arterial vascular malformation. Tr. 26. At step three, the ALJ
20 found that Plaintiff’s impairments did not meet or medically equal a listed

1 impairment. Tr. 27. The ALJ then determined that Plaintiff had the residual
2 functional capacity to:

3 perform light work as defined in 20 CFR 404.1567(b) and 416.967(b)
4 with the following additional limitations: never climb ladders, ropes
5 or scaffolds; only occasionally climb ramps and stairs, and balance;
6 only frequently steep, crouch, kneel and crawl; and he must avoid
7 concentrated exposure to extreme cold and avoid moderate exposure
8 to hazards (moving machinery and unprotected heights).

9 Tr. 27. At step four, the ALJ found that Plaintiff was able to perform his past
10 relevant work as a security guard. Tr. 31. Though not necessary in light of her
11 step four finding, the ALJ proceeded to step five. After considering the Plaintiff's
12 age, education, work experience, and residual functional capacity, the ALJ
13 concluded that there are jobs that exist in significant numbers in the national
14 economy that the Plaintiff can perform. Tr. 31-32. Thus, the ALJ concluded that
15 Plaintiff was not disabled and denied his claims on that basis. *Id.*

16 The Appeals Council denied Plaintiff's request for review on August 14,
17 2012, making the ALJ's decision the Commissioner's final decision for purposes
18 of judicial review. Tr. 1-7; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

19 ISSUES

20 Plaintiff raises one issue for review: whether the ALJ properly considered
the opinions of treating physicians Daniel W. Moullet, M.D., and Edmund W.
Gray, M.D. ECF No. 14 at 11-15; ECF No. 16 at 2-4.

DISCUSSION

Plaintiff contends that the ALJ erred in rejecting the opinions of treating physicians Dr. Moullet and Dr. Gray that Plaintiff was disabled. ECF No. 14 at 11-15; ECF No. 16 at 2-4. Specifically, Plaintiff contends that the ALJ improperly rejected these physicians' opinions on the ground that they relied too heavily on Plaintiff's subjective complaints. ECF No. 14 at 13-14; ECF No. 16 at 3-4.

A treating physician's opinions are entitled to substantial weight in social security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted, an ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). "However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray*, 554 F.3d at 1228 (quotation and citation omitted). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)). An ALJ may also reject a treating physician's opinion which is "based to a large extent on a claimant's self-reports that have been properly discounted as incredible."

1 *Tommasetti v. Astrue*, 553 F.3d 1035, 1041 (9th Cir. 2008) (internal quotation and
2 citation omitted).

3 The ALJ afforded “significant weight” to the opinions of treating physicians
4 Dr. Moullet and Dr. Gray, except as to two brief comments concerning Plaintiff’s
5 apparent inability to work. Tr. 31. As Defendant correctly notes, the ALJ rejected
6 these opinions because they were based almost exclusively upon Plaintiff’s
7 subjective complaints of disabling headaches and/or seizures—complaints which
8 the ALJ had previously rejected as not credible. Specifically, the ALJ explained:

9 There are a lot of factual inconsistencies in this record. The claimant
10 reports having migraines since he was 14 years old. This means the
11 claimant worked at [substantial gainful activity] levels prior to his
12 alleged onset date. The claimant even reported to Dr. Moullet that he
13 did not feel he was disabled. The claimant’s level of physical activity
14 is also inconsistent with his allegations of disability. The claimant has
15 reported that he has hauled firewood, siphoned gas, helped a friend
16 move cars, and drove a pickup in the woods [and] hit a stump. The
17 claimant has also twice reported that he was shoveling snow. The
18 claimant reported in July 2008 that he was doing a lot of swimming.
19 This claimant reported working on cars, playing with his kids, fishing,
20 and sledding, although he previously reported that he did not go
fishing. In addition, the claimant has reported that he did not drive
because he did not want to put his family or others in danger and
[because of] the fact that a physician told him he could not drive.
However, the record reflects several inconsistencies in which the
claimant did drive, and dr[ove] while drunk on one occasion.
Furthermore, at the hearing the claimant testified that he drives to see
his children now. These factual inconsistencies seriously affect the
claimant’s credibility.

One of the problems with this case is [that] it is unclear whether there
is a current diagnosis of seizures or epilepsy for this claimant. The
claimant did not respond to epileptic medication, but there is no

1 objective evidence to confirm whether the claimant's "episodes" are
2 seizures. The state agency expert noted this problem and opined that
3 the claimant had no exertional limitations. A state agency mental
4 expert opined that the claimant had no medically determinable
5 psychological impairment. Considering all the evidence of record, the
6 claimant's physical allegations, and the noted problems with the
7 claimant's credibility, the undersigned finds that the claimant is
8 limited to the above residual functional capacity.

9 Tr. 30-31 (citations omitted). The ALJ also noted that Dr. Moullet was reluctant to
10 sign Plaintiff's medical disability paperwork, and only did so after noting that the
11 Plaintiff described himself as able to work with the appropriate medication. Tr.
12 28-29, 346, 348, 354.

13 Having reviewed the entire record, the Court finds that the ALJ's rejection
14 of Dr. Moullet's and Dr. Gray's opinions concerning Plaintiff's ability to work is
15 grounded in clear and convincing reasons supported by substantial evidence. The
16 ALJ expressly found that Plaintiff's subjective complaints of headaches and
17 seizures were not credible. Tr. 28-30. That finding, which Plaintiff has not
18 challenged on appeal, is supported by substantial evidence. The ALJ did not err in
19 rejecting treating source opinions which relied almost exclusively on Plaintiff's
20 subjective complaints. *Tommasetti v. Astrue*, 553 F.3d at 1041. Accordingly,
Defendant is entitled to summary judgment.

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1 **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment (ECF No. 15) is

3 **GRANTED.**

4 2. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **DENIED.**

5 The District Court Executive is hereby directed to file this Order, enter
6 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

7 **DATED** August 22, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge